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Supreme Court, U.S.
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No. 94-2024

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION
and GERALD KRESS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE PETITIONS FOR WRITS OF CERTIORARI FILED BY THE UNITED STATES IN UNITED STATES V. $405,089.23, NO. 95-346, AND UNITED STATES V. URSERY, NO.95-345, DEMONSTRATE THAT A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE.

Just two weeks ago the Government filed Petitions for Writs of Certiorari asking this Court to consider the application of United States v. Halper, 490 U.S. 435 (1989), and the Double Jeopardy Clause to civil forfeiture proceedings. United States v. $405,089.23, No. 95-346 (filed August 28, 1995), and United States v. Ursery, No. 95-345 (filed August 28, 1995).

This Brief is submitted pursuant to Rule 15.7 of the Rules of this Court to call attention to the arguments made in those two Petitions because those cases are closely related to this one and raise similar issues. The positions advanced by the United States in those Petitions lend support to the issuance of a writ of certiorari in this case, and are inconsistent with its opposition to review by this Court in the instant matter.

The Government argues in the two recent Petitions that the central reason that the Court should issue writs of certiorari is that there is disarray on the question of how to determine the punitive or compensatory nature of a civil forfeiture sanction, for purposes of double jeopardy. Such an determination is necessary since this Court has repeatedly held, most recently in Witte v. United States, 115 S.Ct.2199 (1995), that the Double Jeopardy Clause bars punishing a person twice for the

same conduct. See Ursery Petition at pp. 7-10; $405,089.23 Petition at pp. 9-14[1]

Underlying the decisions of the Courts of Appeals in Ursery and $405,089.23 of which the Government seeks review is the view that all forfeitures are punitive in nature and therefore that a particularized analysis of the purposes of the forfeitures in the individual circumstances of the cases is not necessary.

That view is wrong, says the Government in its two recent Petitions. Halper does not require or permit such a categorical approach, that is, one categorizing a particular type of sanction as either entirely punitive or entirely compensatory. Instead, Halper requires a specific case-by-case factual inquiry to determine the degree to which the civil sanction in question is punitive or compensatory and to mold its relief accordingly. In the Ursery Petition, the Government contends that under Halper, "it is ordinarily necessary to examine the particular civil sanction imposed on a case-by-case basis to determine whether it constitutes 'punishment' for double jeopardy purposes." See, Ursery Petition, at p 8. In the $405,089.23 Petition, it cited

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[1] Two issues presented in Ursery and $405,089.23 are not involved here, that is, whether a civil forfeiture proceeding associated with a criminal proceeding is a second proceeding or the same one for double jeopardy purposes, and whether the conduct sanctioned by the civil forfeiture proceeding is the same conduct as that subject to the related criminal prosecution for purposes of double jeopardy.

United States v. Borromeo, 995 F.2d 23, amended on reh'g, 1 F.3d 219 (4th Cir. 1993), a case in which the Court of Appeals for the Fourth Circuit conducted an "asset-by-asset" Halper analysis, as an example of what it believes to be the correct approach. See $405,089.23 Petition at p. 14.

In taking those positions, the Government was echoing the views expressed in the Petition in this case, in which Petitioners ask the Court to consider and to settle the principles applicable to determination of when a civil sanction is punitive rather than remedial, and that Halper and this Court's opinion last year in Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994), require, "that lower courts conduct specific and particularized assessments based on factual determinations of the Government's costs to assess the character of a proposed False Claims Act sanction." Petition at 10.

Petitioners claimed in the courts below that the imposition on them of a civil sanction under the False Claims Act, 31 U.S.C. §3729 et seq., of more than $2 million in excess of the loss suffered by the Government as a result of Petitioners' criminal conduct constituted an impermissible second punishment. At the least, Petitioners contended that under Halper such a difference required the trial court to conduct a particularized inquiry into the question of whether or not the sanction was punitive and therefore impermissible. Review by this Court is appropriate, Petitioners argued -- as the Government argues in the Petitions in $405,089.23 and Ursery -- because the decisions of the courts below and of other lower courts demonstrate the existence of confusion regarding the application of the principles of

Halper. The Petition explained that there are several subsidiary questions involved in the application of Halper, and that the position of the Government and the views of many lower courts on those issues were in disarray.

The Government's response to the Petition in this case was that there is no confusion in the law. A mere $2 million excess award to the Government did not violate the Double Jeopardy Clause, the Government argued, because it was "little more than 4.5 times the actual damages suffered by the government," and that multiple was nothing like the 220 multiple present in the Halper case. See, Response to Petition, at 6. The Government's position was that almost every False Claims Act recovery is compensatory, the only exceptions being mammoth recoveries of amounts hundreds of times greater than the losses sustained by the Government as a result of crimes of "small gauge offenders." Citing United States v. Barnette, 10 F.3d 1553 (11th Cir.), cert. denied, 115 S.Ct. 74 (1994), it contended that the law is clear that even a $35 million excess recovery is not punitive. See, Response to Petition at 4-6. The Government made absolutely no effort to confront the subsidiary issues that petitioners contend to be unresolved under Halper, and dismissed the notion that the lower courts were confused as to how they were applying Halper. In sum, the Government's position as expressed in its Response to the Petition for Certiorari in this case is that as applied to the False Claims Act one may state, almost categorically, that no False Claims Act sanction is punitive.

The Government cannot have it both ways. It cannot contend that all Halper means in this case is a

cursory review noting that Petitioners are not "small gauge offenders" and that the multiple is not like that present in Halper, while at the same time contending in $405,089.23 and Ursery that Halper requires an "asset-by-asset" and "case-by-case" analysis.

The Government correctly notes in the recent Petitions (but not in its Response to the Petition in this case) that there is confusion in the lower courts regarding the application of Halper to civil sanctions. Should Halper be applied in a categorical manner like that employed by the Ninth and Sixth Circuits in $405,089.23 and Ursery, and by the courts below here in summarily rejecting any real analysis of the particular facts of the case before it, or should it be applied, as Petitioners contend here and the Government contends in $405,089.23 and Ursery, by, "examin[ing] the particular civil sanction imposed on a case-by-case basis to determine whether it constitutes 'punishment' for double jeopardy purposes." See, Ursery Petition, at p 8.

No full consideration of that question can occur without a full consideration of how a Halper analysis is done, which is the question squarely presented in this case. As Petitioners explained in detail in their Petition, there are important unanswered questions involving the application of Halper in a case-by-case context.

The Government says that the Court should grant Writs of Certiorari in the Ursery and $405,089.23 cases, "[i]n order to ensure that this Court has a full oppurtunity to explore the double jeopardy issues that continue to divide the lower courts . . ." Ursery Petition at pp. 14-15. For the same reasons, the Court should

grant certiorari in this matter, for it involves some of the identical issues posed by those cases. Fairness as well as a full consideration of the issues compels such treatment.

Respectfully submitted,

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